United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2490

(ORIGINAL)

BJS

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

C.A. Docket No. 74-2490

UNITED STATES OF AMERICA,

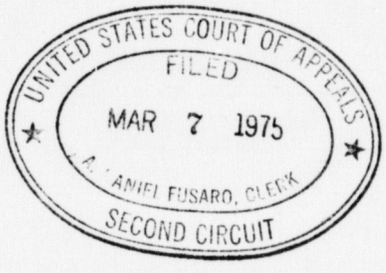
Appellee,

vs.

STANLEY SPIRN,

Appellant-Petitioner

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC



ROBERT S. PERSKY
Attorney for Appellant-Petitioner
40 Journal Square
Jersey City, New Jersey 07306

3

PETITION FOR REHEARING WITH SUGGESTION
FOR REHEARING IN BANC

Appellant respectfully petitions the Court to set aside the judgment on appeal rendered herein on the 27th day of February, 1975 and to grant Appellant a rehearing of the appeal, or in the alternative, to transfer this cause to the Court in banc, for the following reasons:

The proceeding involves questions of exceptionable importance. Many of the questions as set forth herein are of first impression in this jurisdiction and have never been resolved in any court in the United States.

PRELIMINARY STATEMENT

Stanly Spirn petitions this Court with suggestion for rehearing en banc of the affirmance of a judgment by the Court of Appeals, the Honorable Walter R. Mansfield, Honorable James L. Oakes, Honorable William H. Timbers, Circuit Judges presiding.

Indictment 74 Cr. 705, filed on July 15, 1974, charged the defendant in one count with aiding and abetting and attempt to destroy property (1974 Plymouth) located within the United States and belonging to a foreign official in violation of Title 18, United States Code, Sections 970 and 2.

Trial commenced on September 17, 1974 before Hon. Inzer B. Wyatt and concluded on September 23, 1974, when the jury returned a guilty verdict.

NATURE OF THE CASE

The operative facts, the proceedings below and the precise context in which the the issues arose, are set forth in Petitioner's Brief (pp.4 to 9) and may be summarized as follows:

The defendant and another were indicted for violating Title 18 U.S.C. Sections 970 and 2. The co-defendant elected to be tried as a juvenile.

Counsel for defendant made a timely application to be appointed counsel for defendant Sprin under the Criminal Justice Act.

In a pretrial hearing the Court denied defendant's motion for electronic surveillance disclosure upon the Government's mere representation that no evidence derived from any electronic surveillance will be used in the trial.

The trial revealed through the Government's testimony that two police officers while on patrol at 4:30 in the morning observed two individuals, which later turned out to be the defendant and the co-defendant, in a car parked at the curb behind an automobile also parked at the curb. The automobile in front of the defendants had DPL license plates which car belonged to an alleged Russian attache of the United Nations.

The officers testified that they saw the juvenile pour a liquid onto the automobile in front of the car which was owned by the defendant and in which the defendant was sitting behind the wheel. This liquid was later charged to be gasoline.

The Government produced Mr. Saul Kuttner, an adviser of International Organization affairs with the United States Mission of the United Nations. Mr. Kuttner attempted to establish that the automobile upon which the gasoline was poured was owned by one Valdimer Yezhov. Mr. Kuttner produced a document which indicated that DPL plates on that automobile had been issued to Mr. Yezhov. Mr. Kuttner further produced a letter from the State Department in Washington stating that it had no objection to the inclusion of the name of Valdimer Yezhov on the diplomatic lost.

From the aforementioned information Mr. Kuttner concluded that Valdimer Yezhov was an attache of the U.S.S.R.

Over defense counsel's objection the Court permitted the Assistant U.S. Attorney to read to the jury the findings of Judge Tyler, first as to the adjudication of delinquency against Mitchell Rein, a co-defendant in the juvenile proceedings, and then as to the findings of delinquency of the defendant Spirn. The purpose of the reading of findings in the aforementioned matter was stated by the Court to indicate a motive for which the defendant now stands trial.

The Government then rested its case. The defendant did not produce any defense.

The defendant was found guilty and sentenced to four months imprisonment and two years probation. The Court of Appeals for the Second Circuit affirmed said judgment without rendering an

opinion on February 27, 1975.

ARGUMENT

The Court omitted to accord proper weight to the trend of national decisionsand judicial precendentsin deciding the issue raised in Point One of the defendant's Brief as to electronic surveillance. Defendant contends that the Court erred in not directing the Government to affirm or deny the existence of governmental electronic surveillance of the defendant or his alleged co-conspirator and of the defendant's attorneys as set forth in defendant's Motion for the Disclosure of the Electronic Surveillance. The Court denied said Motion at a pretrial conference on September 12, 1974. In finding against the defendant, Judge Wyatt ignored In Re Horn, 458 Fed. 2nd 468 (1972) (Dist. of Pa. 3rd Cir.), which held that:

> "When the witness filed a petition to suppress pursuant to 18 U.S.C. Section 2518 (10) (a), the Government is obliged to affirm or deny the occurrence of the lawful act." 18 U.SC. Section 3504 (a) (1). It may do so by affidavit. In the matter of Grumbles, 453 F. 2nd 119 (3rd Cir. 1971). If the Affidavit is sufficient on its face and the Petitioner offers nothing to indicate that the Affidavit is false or defective, the trial court has the power to deny the petition."

The trial Court merely inquired of the U.S. Attorney whether or not there would be "any evidence introduced as a result of wire taps". The U.S. Attorney answered "No". The Court then stated: "Mr. Persky, that ends that." The Court of Appeals apparently overlooked the above cited In Ré Horn and also apparently overlooked

the case cited in defendant's Brief on Page 12 that of Alderman v. United States, 394 U.S. 165 (1969) at Page 186, which held that a finding should be made by theDistrict Court to determine whether with respect to the defendant there had been an electronic surveillance, which violated his Constitutional right; if there was such surveillance, the relevance of such surveillance to his indictment, should be determined.

The Petitioner contends that the Court of Appeals has overlooked or misapprehended the Second Point of defendant's Brief, in which the defendant contends that the Government failed to establish that the alleged Russian National was "duly notified" to the United States as an officer or employee of a foreign government and was present in the United States on official business as required by 18 U.S.C. 970.

The statute under which the defendant was found guilty 18 U.S.C. 970 refers to 18 USC 1116 subsection (b) (2) in defining "foreign official". Said subsection defines a "foreign official" as

> "any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and anymember of his family whose presence in the United States is in connection with the presence of such officer or employee."

Subsection 1116 of Title 18 U.S.C. defines -foreign official- in Subsection (b) (2) as one "who is in the United States on official

business". Absolutely no proof was introduced by the Government to establish that Valdimer Yezhov was present within the United States at any time before, during or after the alleged offense.

The legislative history of the Act is set forth in defendant's Brief starting on page 32a. The Act is entitled "ACT FOR THE PROTECTION OF FOREIGN OFFICIALS AND OFFICIAL GUESTS OF THE UNITED STATES". The legislative history of Public Law 92-539 states in the U.S. Code Cong. and Adm. News p 4318 that:

> "The bill under consideration recognizes that the United States as a host country has a particular responsibility to protect the person and property of "foreign officials" including ambassadors, agents, employees and their families, while such persons are present within our territorial confines." (EMPHASIS SUPPLIED)

The Senate Judiciary Committee recommended enactment of the aforementioned public law because:

> "Acts of physical violence against members of the diplomatic corps and other foreign officials and official guests in our Country are alarming and can cause a real threat to the free intercourse between the United States and other nations of the world." (EMPHASIS SUPPLIED).

In the "Statement of Findings and Declarations of Policy" accompanying the Act, Congress delcared:

> "The Congress finds...that harassment, intimidation, obstruction, coercion, and acts of violence committed against foreign officials or their family members in the United States or against official guests of the United States adversely affect the foreign relations of the United States." (EMPHASIS SUPPLIED)

It is therefore quite clear that the Statute under which

the defendant was convicted requires that the foreign official be present within the United States and on offici..l business at the time of the offense. Congress intended to protect foreign officials and their property only so long as the foreign official is present within the United States on official business.

By reason of the failure of the Government to establish that he was present in the United States at the time of the alleged offense, and the failure to establish that he was on official business at said time, the conviction below should be reversed.

It is contended that the Court of Appeals has overlooked or misapprehended the trial court's error in allowing the government to refer to the former adjudication of the defendant as a juvenile delinquent. See Cotton v. United States, 355 F.2d 480 (1966) 10th Circuit, Court of Appeals.

In Thomas v. United States, 121 F.2nd 905 (1941), the Court of Appeals of the District of Columbia did not allow evidence to be introduced by the defendant's counsel which evidence had been adduced in a Juvenile Court proceeding.

In discussing the Juvenile Delinquency Act of the District of

Columbia, the Court states on page 908 that:

> "It would be a serious breach of public faith, therefore, to permit these informal and presumably beneficient procedures to become the basis for criminal records, which could be used to harass a person throughout his life. There is no more reason for permitting their use for such a person, than would be to pry into school records or to compile family and community recollections concerning youthful indiscretions of persons who were fortunate enough to avoid the juvenile court."

Also see more recent case in the District of Columbia circuit, Court of Appeals, Brown v. United States, 338 F.2nd 543 (1964).

In the United States v. DiLorenzo, 429 F2nd 216 (1970) the Second Circuit reviewed a trial judge's advisory ruling that the government could use certain prior felony convictions for impeachment purposes on the issue of credibility against the defendant. The court on page 220 stated:

> "Both of these convictions were for crimes affecting credibility, and when convicted appellant was not a minor..." (EMPHASIS ADDED)

The Court of Appeals aside from overlooking or misapprehending the philosophy of the Juvenile Delinquency Act and of the Second Circuit comment as set forth in the United States v. Di Lorenzo, supra, also failed to give heed to the new Federal Rules of Evidence P.L. 98-595, 93rd Congress, H.R. 5463 which were made effective on July 1, 1975, admittedly subsequent to the conviction of the defendant.

Rule 609 of the above mentioned Rules concerns itself with impeachment by evidence of conviction of crime. Section D of Rule

609 states:

> "(d) Juvenile adjudications-Evidence of juvenile adjudication is generally not admissible under this rule. The Court may, however, in a criminal case allowevidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilty or innocence." (EMPHAIS SUPPLIED)

Quite apparently therefore from a review of the philosophy of the Juvenile Delinquency Act, the case law and the Federal Rules of Evidence, such juvenile adjudications are inadmissible in evidence against the accused.

The Court of Appeals has overlooked or misapprehended the trial court's error in allowing government counsel to read to the jury the transcript of findings and special findings made in a juvenile court in a proceeding against the defendant and another to prove the defendant's intent or motive with respect to the charge in the indictment.

The Assistant U.S. Attorney read over defense counsel's timely objection the entire finding in regard to Mitchell Rein; he read the entire transcript of the findings as pertaining to defendant, Mr. Spirn, with the exception of the concluding remarks. It should be noted in arguing this point, counsel for the defendant does not concede that the introduction of any evidence of the findings or adjudication of juvenile delinquency is admissable in a subsequent trial of defendant.

It is submitted that evidence of a prior similar act was not admissable in the case at bar to prove motive or intent in the crime of which the defendant stands accused. If a prior similar act of the defendant is proposed to be admitted into evidence to establish motive or intent the Court should carefully balance the value and extent of evidence of the prior similar act in contrast to the prejudicial effect such evidence would have on the minds of the jurors, in determining whehter or not the defendant is guilty of the charge of which he is being tried. In the case at bar the evidence deprived defendant of a fair trial.

In United States vs. Myers, 244 F. Sup. 477 (U.S. District Court E.D. Pennsylvania 1955), the Court in discussing the discretion of the judge to allow a prior criminal record of the defendant into evidence stated on page 479 that:

> "What more reasonable conclusion by a jury of laymen than that he was bent on doing precisely the same thing on the night of the crime. Indeed, although the evidence was not properly in the case to persuade the jury of guilt , its very vice is in its over-persausiveness."

It is contended that the extended reading of the findings was over-persuasive and tended to illustrate the defendant's character and his propensity to perpetrate the crime for which he was charged. The Supreme Court of the United States in Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948), at Page 475 stated:

> "Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U.S. 559 62 L.Ed. 469 38 S. Ct. 209, but it simply

> closes the whole matter of character, disposition and reputation in the prosecutions' case-in-chief. The State may not show the defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probably perpertrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persaude them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is a practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

Even though the government may have satisfied the Court that the probative value of the prior similar act of the defendant was relevant and necessary to prove his participation in offense charged nevertheless the court should have prevented such testimony from being admitted into evidence because of its highly prejudicial effect upon the jury, thus denying the defendant a fair trial under due process of law. See pertinent discussion in United States v. Pate, 426 F.2 1083 (U.S.C.A. 7 Cir. 1970), with respect to denial of fundamental fairness and due process of law.

It is submitted that the length and detail of the juvenile findings confused the jurors as to the purpose for which it was introduced into evidence and that the judge's cautionary direction could not properly be understood in view of the length and perplexity of the findings.

In United States vs. Spica, 413 F.2nd 129 (CCA 8th Cir. 1969),

the Court on Page 131 stated:

> "This Circuit is, however, firmly committed to the rule that it is essential to the admissibility of another distinct offense that the proof be plain, clear, and conclusive, and evidence of a vague and uncertain character is not admissible. Kraft v. United States (8 Cir. 1956) 238 F2d 794; Paris v. United States (8 Cir. 1919) 260 F.529."

In the United States v. Machen, (CCA 7th Cir. 1970) at page 526 the Court held that evidence of a prior similar offense must be "crisp, concise and persuasive". Likewise, see Kraft v. United States, 238 F.2nd 794 (8th Circuit 1956), at page 802 and 803. This was obviously not the method employed in the instant case where the prosecutor read long findings -8 pages- of the juvenile delinquency adjudication to the jury which included a detailed review of the evidence.

The strategy of the prosecution in introduc ing the prior juvenile adjudication as its final evidence, together with the length of the finding, emphasized the prior alleged similar act as a feature instead of a mere incident to simply indicate the defendant's possible motive. This procedure was condemned in Williams v. State, 117 So. 2nd 473 (Supreme Court of Florida 1960). At Page 475 the Court revealed its reasons for reversal of the conviction when it stated that:

> "...the question arises whether or not the state was permitted to go too far in introduction of testimony about the later crime so that the inquiry transcended the bounds of relevancy to the charge being tried, and made the later offense a feature instead of an incident. This may not be done for the very good reason that in a criminal prosecution such procedure devolves from development of facts pertinent to the main issue of guilt or innocence into an assault on the character

> ofthe defendant whose character is insulated from attack unless he introduces the subject."

See also People vs. Jackson, 233 P 2nd 236 (Supreme Court of California 1950).

It is quite evident that the Court of Appeals overlooked Rule 403 of the Federal Rules of Evidence which concerns itself with the exclusion of relevant evidence on ground of prejudice, confusion or waste of time. The Rule reads:

> "Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, wast of time, or needless presentation of cumulative evidence." (EMPHASIS SUPPLIED)

It is further submitted that the Court of Appeals overlooked or misapprehended counsel's application for compensation for services rendered at the arraignment, motions, trials and sentencing under the Criminal Justice Act.

The defendant's counsel made timely application requesting his appointment to represent the defendant under the said Act. The Court refused to appoint counsel under the Act, for reason that the Criminal Justice Act Plan of the Second Circuit, Southern District of the United States District Court does not provide for counsel to be appointed who is not on the panel. The Court went on to state that it did not see any reason why it should appoint a New Jersey lawyer even if such lawyer is capable of defending the matter.

In Bates vs. Oddo, 479 F2d 978 (1973) (C.A. Second Cir.) the Court held that where an individual is not on the panel of attorneys who were

eligible for appointment under the Criminal Justice Act and further where no application to appoint said individual was made under the Criminal Justice Act to represent the defendant pro hac vice the request of appointedcounsel for compensation for services performed under the Act will be denied.

In the case at bar, defendant's counsel was appointed pro hac vice both for the purposes of arraignment and for the purpose of trial.

It is further submitted, that the Chief Judge is permitted to make additions to the Panel of Attorneys pursuant to Article 1, of the Plan of the United States District Court for the Southern District of New Jersey for the sole purpose of representing a defendant of a particular case. This authorization is pursuant to the Criminal Justice Act of 1964 (18 U.S.C. 3006 A).

Of pertinent interest is United States of America vs. Torres in SecondCircuit, 72 Cr. 391 wherein an Order was entered pursuant to the authority vested under the aforementioned Plan directing that a certain designated attorney be "added to the Panel of Attorneys for the sole purpose of representing the defendant Wilson Torres in the above entitled case...Dated: New York, New York March 13, 1974".

CONCLUSION

Wherefore, Petitioner, respectfully requests that this case be reheard and suggests that such rehearing be before the Court

en banc.

Respectfully submitted,

Robert S. Persky

ROBERT S. PERSKY
Attorney for Appellant-Petitioner